United Nations **AT**

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 940

Case No. 1025: NAG

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Mr. Mayer Gabay, Vice-President, presiding; Mr. Chittharanjan Felix Amerasinghe; Mr. Victor Yenyi Olungu;

Whereas at the request of Debabrata Nag, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), the President of the Tribunal, with the agreement of the Respondent, extended to 30 November 1996 the time-limit for the filing of an application with the Tribunal;

Whereas, on 11 November 1996, 12 February and 28 May 1997, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, at the request of the Applicant, the President of the Tribunal, with the agreement of the Respondent, extended to 28 February and 30 June 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 26 June 1998, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal, *inter alia*:

"...

10. ... *to find* that:

(a) The Applicant was terminated without justification;

(b) The appropriate rules and procedures were violated;

(c) He was treated in a prejudicial manner;

(d) The appointment and promotion process was vitiated with irregularities;

(e) [As a result of] (c) and (d) above, the Applicant was denied his due process rights.

11. ... [H]aving found that the termination was unjustly implemented ... *to order* that the Applicant be reinstated retroactively from the date of his termination."

Whereas the Respondent filed his answer on 7 December 1998;

Whereas the Applicant filed written observations on 17 February 1999;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP in Dhaka, Bangladesh, on 17 December 1979, at the G-3, step 1 level, as a Finance Clerk on a short-term appointment. He was given a fixed-term appointment on 1 June 1980 and his functional title was changed to Clerk/Typist. Between 31 August 1980 and 31 December 1987, he received a series of fixed-term appointments for varying periods. He was given a probationary appointment effective 1 October 1987, and on 1 April 1988, his appointment was converted to permanent.

For the period covering 17 December 1979 to 31 July 1989, the Applicant's performance was evaluated in five performance reports. In the first report, covering the period from 17 December 1979 to 31 October 1981, he was evaluated by the Finance Officer and received ratings of "Good" for job knowledge and competence, and an overall rating of

"[a] competent and well-qualified staff member whose performance meets expected standards." In the second to the fifth reports, covering the period from 1 November 1981 to 31 July 1989, he was evaluated by the Fellowship Officer. In the report for the period of 1 November 1981 to 31 December 1983, he received "Good" for job knowledge and competence and the overall rating was the same as in the first report. In the reports for the periods covering 1 January 1984 through 31 May 1987, his job knowledge and competence was rated "Very Good" and his overall rating was "[a]n excellent staff member whose performance exceeds expected standards". In the fifth report covering from 1 June 1987 to 31 July 1989, the rating for job knowledge and competence remained "Very Good" but the overall performance reverted to the original rating of "[a] competent and well-qualified staff member whose performance meets expected standards".

The next three performance reports, covering the period 1 August 1989 through December 1992, the Applicant's performance was evaluated by three different supervisors. In the first one, from 1 August 1989 to 31 August 1990, the Applicant received a rating of "Below standard" for job knowledge and competence, and an overall rating of "[a] staff member whose performance is moderate but does not meet expected standards". The second and third reports followed the Performance Appraisal Review (PAR) system. The supervisor's rating from January to December 1991 was "Meets some of the expectations of the performance plan but performance needs improvement", and accordingly the final management review rating was "4". In the report from January to December 1992, the supervisor's rating was "Meets the expectations of the performance plan", but the final management review was "Meets some of the expectations of the performance plan but performance needs improvement", with an overall rating of "4".

On 16 September 1993, the Head of Personnel advised the Assistant Resident Representative that the Applicant, having completed five years under permanent appointment, was due for the five-year review called for under staff rule 104.13 (a) (ii), and requested

advice on whether the Applicant had maintained the required standard of efficiency, competence and integrity.

By memorandum dated 29 September 1993, the Assistant Resident Representative informed the Head of Personnel that while the Applicant had initially met expected standards, the reports covering the period August 1989 through January 1992 described his performance as below the expected standard.

The local Appointment and Promotion Panel (APP) of UNDP, Dhaka, Bangladesh, reviewed the first five years of Applicant's permanent appointment at its meetings No. 7/93 and 8/93 held respectively on 4 and 11 November 1993. The relevant paragraph regarding the case of the Applicant in the Panel's report reads as follows:

> "The panel thoroughly reviewed the documentation submitted by the administration. The latter indicates that the staff member has been a substandard performer for the last four years. Although the staff member was categorically urged to remedy this situation and warned to improve his shortcomings by the Management Review Group in his previous PAR, [the Applicant] did not take any initiative to improve or to remedy these shortcomings. The immediate supervisor's report also confirms the panel's conclusion. In view of the fact that [the Applicant] has failed to maintain a minimum standard of efficiency, competence and integrity established in the Charter during the period of his permanency, the members of the APP unanimously agreed to recommend discontinuation of his permanent appointment with UNDP."

On 9 March 1994, the APP's recommendation was referred to a joint review body (JRB) for advice, in accordance with the applicable provisions of the UNDP Personnel Manual. The three-member of the JRB, which included a staff representative, reviewed the documentation and interviewed several people, including the Applicant. The JRB report stated, *inter alia*, as follows:

> "A review of the PARs for 1991-1993 reveals that [the Applicant] has always agreed with the comments of [his] supervisors. Surprisingly, [the Applicant] in his letter [to the JRB] claims that for the sake of maintaining good relationship he always

accepted the comment and ratings of his supervisors. ... [the Applicant] has been working in the system for more than 14 years and it is difficult to believe that he was not aware of the consequences of the consistent poor ratings over time.

[The Applicant] mentions in his letter ... that due to frequent movements 'the performance evaluators have had little scope to judge my appropriate skills and efficiencies'. It is true that he had to work under several supervisors but with the change of supervisors the nature of his job did not change. All the supervisors (1989-93) maintained that [the Applicant] lacked technical skill in respect of typing letters, taking telephone messages accurately, filing documents consistently and also he was sluggish and lack[ed] organized approach to his job."

The final paragraph of the JRB report recommended as follows:

"There [is] sufficient evidence to prove the inefficiency of [the Applicant]. So it is recommended that his permanent contract be terminated as recommended by the 7th meeting of the 1993 Appointment and Promotion Panel."

The Resident Representative noted her concurrence with the recommendation on 19 June 1994.

On 6 November 1994, the Assistant Resident Representative, UNDP, certified that the Applicant's performance and conduct were "satisfactory and warrant [a] salary increment". On 1 December 1994, the Applicant received a further within-salary increment.

On 2 December 1994, the Administrator, UNDP, approved the proposal of the Director, Division of Personnel (DOP), that the Applicant's permanent appointment be terminated for unsatisfactory performance in accordance with the provisions of staff regulation 9.1 (a), and also in "line with the PAR process which allows for termination following three consecutive '4' ratings and where coaching and training have not corrected the problem."

The Applicant was informed by the Acting Resident Representative on 28 December 1994 of the Administrator's decision to separate him from service.

On 25 February 1995, the Applicant requested a review, under the terms of staff rule 111.2 (a), of the decision to terminate his appointment. The decision of the Administrator was maintained in a letter to the Applicant, dated 29 March 1995, from the Chief, Legal Section, DOP, noting that all the required procedures had been followed in the Appellant's case and he had therefore been accorded due process.

On 25 May 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB unanimously adopted its report on 30 May 1996. Its considerations, conclusions and recommendations read, *inter alia*, as follows:

> ***"Considerations***
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> 21. The Panel first considered the question whether or not the Appellant's due process rights were respected.
>
> 22. The Appellant contends that in as much as the vice-chairman of the local APP, who was a member of the local APP which recommended the termination of his permanent contract, was also a member of the JRB which reviewed that APP's recommendation, the requirements of due process were not satisfied.
>
> 23. The Respondent counters that the JRB was established strictly in accordance with the applicable provisions of the UNDP Personnel Manual and that the decision by the Administrator of UNDP to terminate the permanent appointment of Appellant was made only after the matter had been reviewed by two independent bodies, the APP and the JRB.
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> 24. The Panel noted that the procedure to satisfy the requirement of due process in case of termination of a permanent appointment is provided for in section 10800 (1.6) (d) (Revised edition, November 1991) of the UNDP Personnel Manual, and that section 10800 (1.6) (d) (i) (1) provides, *inter alia*: '... The joint review body consists of the vice-chairman and two alternates of the Appointment and Promotion Panel. ...' The Panel found, and was of the view, that the composition of the JRB was in conformity with the provisions of the UNDP Manual.
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> 25. The Panel noted, however, and was concerned that there were lapses on the part of the Administration, as well as disturbing contradictions in the action of the

Administration which raised false expectations in the Appellant, which tend to show that the Appellant was unfairly treated. For example:

(i) During the period 17 December 1979 to 31 July 1989, the Appellant's PER ratings were 'very good'; they dropped suddenly in the subsequent PER to 'below standard'. What might have caused the sudden decline in the Appellant's performance? Were his earlier ratings justified?

(ii) The Appellant was regularly awarded within-grade salary increments, with the last award effective 1 December 1994, notwithstanding the process to effect his termination for unsatisfactory performance was begun on 11 November 1993. Was the Assistant Resident Representative unaware of the Appellant's pending termination?

(iii) The Administration was seemingly insensitive to the welfare of the Appellant and of the underlying cultural differences, as was evident from its handling of his illness in 1990, and its seeming unwillingness to meet with the Appellant, despite several requests.

26. While the Panel noted the foregoing lapses on the part of the Administration, it did not find, however, that they were motivated by prejudice or any other extraneous factor.

27. In considering the Appellant's appeal, the Panel was not unmindful that '[i]n the case of termination on grounds of inefficiency or relative efficiency, the Panel shall not consider the substantive question of efficiency but only evidence that the decision was motivated by prejudice or by some other extraneous factor'. (Staff rule 111.2 (k)).

Conclusions and recommendations

28. The Panel *unanimously agreed* that the Appellant's due process rights were respected.

29. Given the false expectation which was raised in the Appellant by periodic within-grade increments, coupled with the lack of sensitivity on the part of the Administration, the Panel *unanimously agreed* that the Appellant was unfairly treated and thus injured.

30. The Panel *unanimously recommends* that, as a symbolic gesture, the Appellant be paid compensation in the amount of three months of his net salary for the injury he sustained.

31. The Panel *agreed* to make no further recommendation in support of the appeal."

On 2 July 1996, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him, in part, as follows:

"...

The Secretary-General has examined your case in the light of the Board's report and is in agreement with the Panel that your due process rights were respected. He is not in agreement with the Panel that you were unfairly treated or injured by the actions of the UNDP Administration and specifically does not consider that the award to you of periodic within-grade increments was unfair or caused you injury. Accordingly, the Secretary-General has decided not to accept the Panel's recommendation that you be paid compensation for injury sustained. As your due process rights were respected, the Secretary-General has decided to take no further action in respect of your case.

The above-mentioned decision of the Secretary-General is 'the final decision on the appeal' mentioned by staff rule 111.2 (o). Therefore, any recourse should be addressed to the Administrative Tribunal.

..."

On 26 June 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant was treated unfairly, was denied due process and his termination from service was vitiated by prejudice.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's permanent appointment was in accordance with the Staff Regulations and Rules.

2. The Applicant was afforded full due process.

3. The Applicant has produced no evidence that the decision of the Administration was based on prejudice or extraneous factors.

The Tribunal, having deliberated from 4 to 19 November 1999, now pronounces the following judgement:

I. The Applicant's employment was terminated for unsatisfactory service on 31 December 1994, after he had worked for UNDP in Dhaka, Bangladesh, on dixed term appointments from 17 December 1979, until he became a permanent staff member on 1 April 1988. He complains that:

(i) His employment was terminated without justification;

(ii) There was prejudice against him;

(iii) The appointment and promotion process was vitiated by procedural irregularities; and

(iv) As a consequence of (ii) and (iii) above he was denied due process.

II. The Tribunal holds that, in accordance with general principles of international administrative law and as in the case of other administrative decisions such as transfer (Judgement No. 167, *Fernandez Rodriguez* (1973)) and promotion (Judgement No. 275, *Vassiliou* (1981)), the Administration has discretionary authority to terminate appointments for unsatisfactory service. The determination whether performance is unsatisfactory is also a matter within the discretion of the Administration. As in the case of discretionary powers in

general (cf. Judgements No. 616, *Sirakyan* (1993); No. 834, *Kumar* (1997); No. 862, *Szekielda* (1997); and No. 892, *Sitnikova* (1998)), the Tribunal will not substitute its judgement for that of the Respondent. However, the discretion to terminate employment for unsatisfactory service is not unfettered. In general, the Tribunal reviews the exercise of discretion to determine whether it is vitiated by substantive or procedural irregularity, by improper motive or purpose or prejudice or by any other abuse of discretion.

III. In this case there is no evidence that the determination that the performance of the Applicant was unsatisfactory was substantively flawed. The Applicant's performance had been rated since 1991, as "needs improvement", so that there were ample grounds for treating his performance as not meeting expectations. Thus, there was no error of fact or erroneous conclusion which would substantively have tainted the decision.

IV. In regard to the manner in which his unsatisfactory performance and termination were handled, the Tribunal notes that the Applicant received notice well before his appointment was terminated. In addition, the Respondent claims that the Applicant was given "coaching and training" in order to help him overcome his problems and to improve his performance. Thus, the Applicant was or should have been fully aware that the Administration was not satisfied with his performance for a number of years. He failed to remedy the defects in his performance. The fact that the Applicant was never denied the normal within-grade salary increment does not alter the situation. It by no means should have given him the impression that his overall performance was treated as satisfactory.

V. There are some other aspects of procedure that are disturbing, however. No performance review, under the Performance Appraisal Review (PAR) system, was prepared for the period September 1990 to February 1991, and contrary to the requirements of administrative instruction UNDP/ADM/23 of 16 March 1990 outlining the PAR system, one

annual review was prepared by someone who had supervised him for a period of only three months. In addition, another review was prepared by someone who was at no time his supervisor. Furthermore, a certification given one month before his appointment was terminated for purposes of a within-grade salary increment described his performance as "satisfactory". It is unnecesary to determine whether, if these flaws had not been present, the Administration's conclusion that the Applicant's performance was unsatisfactory would have been changed, particularly given the overwhelming evidence of poor performance. However, in the light of the Tribunal's jurisprudence which has emphasized the importance of having formal performance reviews not only done but properly done (cf. Judgements No. 246, *Fayemiwo* (1979); and No. 356, *Giscombe*, (1985)) the Tribunal holds that such injury done to the Applicant by the failure to fulfill the requirements relating to performance reviews deserves compensation, because such failure could have affected the Applicant's right to be evaluated properly in terms of the quality of his performance. In addition, the Tribunal stresses the importance of transparency in dealing with matters of performance and characterizes the lack of it as a flaw. In its view, the Applicant was also treated unfairly in this regard. These flaws are not serious enough to justify the quashing of the decision to terminate the Applicant's services but they are, nevertheless, not marginal and, therefore, the Applicant must be compensated for the injury done to him.

VI. The Applicant also alleges prejudice on the part of his supervisors. The allegations of prejudice are, however, not substantiated. Where prejudice or improper motive is alleged by the Applicant to have vitiated the termination decision, the burden is on him to provide evidence to support his allegation (cf. Judgements No. 581, *Narula* (1992); No. 613, *Besosa* (1992); and No. 639, *Leung-Ki* (1994)). On the basis of all the evidence on the record the Tribunal will then decide whether on the balance of probabilities the allegation has been proved. In this case the Applicant has not proffered any evidence to support his allegations so

that the record does not show that there was prejudice or improper motive on the part of the Respondent. This claim is, therefore, dismissed.

VII. For the foregoing reasons, the Tribunal orders the Respondent to pay the Applicant an amount equal to three months of his net base salary, at the rate in effect on the date of his separation from service, as compensation for the irregularities noted.

VIII. All other pleas are rejected.

(Signatures)

Mayer GABAY
Vice-President, presiding

Chittharanjan Felix AMERASINGHE
Member

Victor YENYI OLUNGU
Member

New York, 19 November 1999

Maritza STRUYVENBERG
Executive Secretary